Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

80-1674

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

Consumers Power Company, and the
Pension Plan for Employees of Consumers
Power Company,

Petitioners

vs.

Utility Workers Union of America
AFL-CIO, and its Michigan State Utility
Workers Council, Lewis J. Tinklepaugh,
Clarence J. Segorski, Leo Lingram, Burnell Clough
Robert Yon, Ray Rogers and Paul de Hate,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM O. ALLEN
ARUNAS T. UDRYS,
DONOVAN E. CHENEY AND
WILLIAM M. ABBOTT
Attorneys for Petitioner
145 South Jackson Street
Jackson, Michigan 49201
(517) 787-4100

PRELIMINARY MATTER

QUESTION PRESENTED

Did the Court of Appeals err in holding that the Pension Plan for Employees of Consumers Power Company cannot continue to determine the benefits under the Plan by using a collectively bargained offset which credits to Plan benefits weekly benefits received under the Michigan worker's compensation law?

LIST OF PARTIES TO THE PROCEEDING

The names of all the parties to this proceeding are contained in the caption of the case.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	i
Table of Authorities	iii
Reports of Opinions Below	2
Jurisdiction	2
Statutory Provisions and Regulations Involved	2
Statement of Case	3
Reasons for Granting	6
Conclusion	8

APPENDIX

Appendix A	1
Appendix B	24
Appendix C	47

TABLE OF AUTHORITIES

Alessi v. Raybestos-Manhattan, Inc., 616 F.2d 1238, Supreme Court Docket No. 79-1943

Buczynski v. General Motors Corporation, 616 F.2d 1238, Supreme Court Docket No. 80-193

IN THE

Supreme Court of the United States

October Term, 1980

No._____

Consumers Power Company, and the
Pension Plan for Employees of Consumers
Power Company,

Petitioners

vs.

Utility Workers Union of America
AFL-CIO, and its Michigan State Utility
Workers Council, Lewis J. Tinklepaugh,
Clarence J. Segorski, Leo Lingram, Burnell Clough
Robert Yon, Ray Rogers and Paul de Hate,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Consumers Power Company and the Pension Plan for Employees of Consumers Power Company, pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit, entered in this case on January 6, 1981, and with respect to which a rehearing was denied on February 13, 1981.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals will be reported at 637 F2d 1082 (1981). The opinion of the United States District Court appears at 453 F.Supp 447 (1978).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 6, 1981. On January 16, 1981, a timely Petition for Rehearing was filed on the part of the Petitioners with the Court of Appeals. This Petition was denied by Order of the Court of Appeals on February 13, 1981. The jurisdiction of this Court is invoked under 28 USC §1254(1) and §2101(c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Internal Revenue Code of 1954, Sec. 401(a)(5), 26 U.S.C. §401 (a)(5)

Employees Retirement Income Security Act, Sec. 203(a), 29 U.S.C. §1053(a)

Internal Revenue Code of 1954, Sec. 411, 26 U.S.C. §411

Employees Retirement Income Security Act, Sec. 3(19), 29 U.S.C. §1002(19)

Income Tax Regulations, Sec. 1.411(a)-4, 26 CFR §1.411(a)-4

Pension Benefit Guaranty Corporation Regulations, Sec. 2605.3, 29 CFR §2605.3

Pertinent provisions of the statutes and regulations are set forth in Appendix C, infra, pages 47 to 51 .

STATEMENT OF THE CASE

Petitioner Consumers Power Company ("Consumers") is a corporation organized under the laws of the State of Michigan, with its principal offices in Jackson, Michigan, and is engaged as a public utility in the production, transmission, distribution and sale of energy, including electricity and gas, within the State of Michigan. Michigan Gas Storage Company and Northern Michigan Exploration Company are wholly-owned subsidiaries of Consumers.

Effective July 1, 1944, Consumers established the Pension Plan for Employees of Consumers Power Company ("Plan") for its eligible employees. The Plan has been qualified under the Internal Revenue Code since its adoption. The Plan is a defined benefit plan which provides participants with an ascertainable benefit upon retirement. This Plan has been the subject of collective bargaining between the Utility Workers Union ("Union") and Consumers for many years.

In 1966, a worker's compensation offset provision was added to the Plan in a supplemental agreement which resulted from negotiations between Consumers and the Union. The collectively bargained offset provision remained in the Plan through several subsequent rounds of negotiations, including negotiations which led to the most recent collective bargaining agreement. That agreement was effective September 1, 1977, and provided that the Plan was to remain in effect for a period of six (6) years.

Following the enactment of ERISA on September 2, 1974, the Plan was amended to conform to the requirements of ERISA. As a collectively bargained plan, discussions with the Union were conducted concerning the necessary ERISA amendments and other matters. No objection to the offset was made by the Union.

Thereafter, the amended Plan was submitted to the Internal Revenue Service for qualification. During the qualification process, all interested parties were notified of the proceedings pursuant to Section 7476(b)(2) of the Internal Revenue Code, 26 USC 7476(b)(2). Pursuant to this notification the Utility Workers Union appeared on behalf of its members who were interested parties, and objected to the worker's compensation offset provision. The Internal Revenue Service determined that this objection was without merit and issued a favorable determination letter stating that the Plan was qualified for tax purposes.

The Internal Revenue Service notified the Union representative of its determination, and Plaintiffs instituted the instant litigation by filing a Complaint in Federal District Court seeking a declaratory judgment which would void portions of the agreement between the parties by removing the worker's compensation offset from the Plan.

The retirement benefits for a participant under the Plan are determined in Section V of the Plan, with the benefit formula pertinent to this case being contained in subsections 1 and 2. Subsection

1 is the first of a two-part formula which establishes a participant's aggregate retirement income from the Company. According to the second part of the formula in subsection 2, the amount of retirement income to be paid from the Plan is determined by offsetting the total retirement income amount by the weekly worker's compensation payments received by the participant from the Company. The sum of the payments, under the Plan and under the worker's compensation act, provide the participant with his aggregate retirement income from the Company.

Subsection 2 provides in pertinent part:

> 2. Workmen's Compensation. All Workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of these companies will be a credit against any Retirement Income or any other payments under this Plan...

All worker's compensation payments as well as plan benefits are provided completely by Consumers. Participants are not required to make any contribution. The worker's compensation offset never reduces the total retirement benefit which the employee has been promised and to which he is entitled. There is no offset for payments in liquidation of claims or for medical expenses paid by Consumers under the worker's compensation law.

The Court of Appeals, one Judge dissenting, held that the offset provision of the Plan violates 29 USC §1053(a).

BASIS FOR FEDERAL JURISDICTION

The basis for Federal jurisdiction in the United States District Court is 29 USC §1132.

REASONS FOR GRANTING THE WRIT

1. The issue in this case is presently before this Court in Buczynski v General Motors Corporation and Alessi v Raybestos-Manhattan, Inc., Docket Nos. 80-193 and 79-1943, respectively. These cases were orally argued on March 4, 1981, and it is contemplated that this Court will decide the issue before the end of this term of the Court. It is anticipated that the decision in the Buczynski and Alessi cases will dispose of the issue in this case.

2. In addition, a conflict exists between the Courts of Appeals for the Third and Sixth Circuits, the Court of Appeals for the Third Circuit having decided the Buczynski and Alessi cases directly contrary to the decision of the Court of Appeals for the Sixth Circuit in this case. Consequently, in the highly unlikely event that Buczynski and Alessi are not decided by this Court on their merits, this case should be reviewed by the Court in order to eliminate the conflict between the Circuits.

3. The issue presented in this case is of nation-wide importance. The opinion of the Court of Appeals strikes down a

well-conceived system of integration and correlation of benefits for retired persons, developed over a period of thirty years, and involving about 7,200 pension plans throughout the United States. As pointed out by the dissenting Judge in the Court of Appeals, the majority opinion of the Court of Appeals is a "very direct threat to the stability of the pension plan itself", and "the temporary benefits which a few may gain by the benefit of this 'doubledipping' must inevitably be offset by the economic realities that in the future the impact is bound to be felt in the financial weakening of an otherwise sound pension system."[1]

The worker's compensation offset has been expressly approved and encouraged by the United States Treasury Department for over thirty years. The Treasury Department has expressed its approval in a long series of regulations and rulings. More recently, the Treasury Department has been joined by the Pension Benefit Guaranty Corporation, whose Board of Directors consist of the Secretaries of Treasury, Labor and Commerce. The effect of the majority opinion of the Court of Appeals is to strike down the determinations of the Treasury Department and the Pension Benefit Guaranty Corporation.

---

[1]Appendix A, p.22

CONCLUSION

This Court should issue a writ of certiorari because:

1. This case will be governed by the Court's decision in Buczynski and Alessi.

2. It will be necessary to resolve a conflict between the Circuits on the issue involved in this case.

3. The issue involved in this case is one of paramount importance.

For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

William O. Allen
Arunas T. Udrys
Donovan E. Cheney
William M. Abbott
Attorneys for
Petitioners

145 S. Jackson Street
Jackson, Michigan 49201
(517) 787-4100

No. 78-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS AND PAUL DE HATE,

Plaintiffs-Appellees,

v.

CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 6, 1981.

Before: ENGLE and KEITH, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 21-23) filed a separate dissenting opinion.

PECK, Senior Circuit Judge. There is a single question presented by the appeal now before the Court: do the non-forfeitability provisions of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053(a), prohibit the reduction of pension benefits by the amount that a pen-

sioner receives in workers' compensation insurance benefits? Although this question appears simple, it in fact raises several difficult issues of statutory interpretation. Not only is the Court required to interpret various provisions of ERISA (in conjunction with related provisions of the Internal Revenue Code of 1954 [IRC], 26 U.S.C. § 1 *et seq.*), the Court also is required to analyze the nature of the workers' compensation benefits that are provided by state law.

At the outset, we note that the question on appeal has recently engendered conflicting decisions in several federal courts. For example, in the United States District Court for the Eastern District of Michigan (the district in which the present action was decided), the exact question before us has now been addressed on four separate occasions. In *Bordine* v. *Evans Products Co.*, 453 F. Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978); and *Carlson* v. *Bundy Manufacturing Co.*, Civ. No. 6-72274 (E.D. Mich. August 18, 1977), the district court upheld the validity of the so-called "workers' compensation offset" (*i.e.*, the reduction in pension benefits by the amounts that pensioners receive in workers' compensation benefits). Judge Philip Pratt, the district judge in the present case, wrote the *Carlson* decision; however, in his opinion herein reviewed, Judge Pratt, with exemplary candor, reconsidered his reasoning in *Carlson* and reached the opposite result. In the present action, Judge Pratt entered summary judgment in favor of plaintiffs, and held that the reduction in pension benefits by the amount that a pensioner receives in workers' compensation benefits is a forfeiture that is prohibited by the non-forfeitability provisions of ERISA. *See Utility Workers Union* v. *Consumers Power*, 453 F. Supp. 447 (1978). Shortly after Judge Pratt issued his opinion in the present case, two decisions of the United States District Court for the District of New Jersey expressly followed his reasoning therein. *See Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867 (D.N.J.), *rehearing denied*, 464 F.Supp. 133 (1978);

Alessi v. *Raybestos-Manhattan, Inc.*, CA No. 78-0434 (D. N.J. February 15, 1979). However, on appeal, both of these cases were reversed by the Third Circuit Court of Appeals, on the ground that Congress gave its implicit approval to workers' compensation offsets in various ERISA provisions. Based on this holding, the Third Circuit concluded that ERISA pre-empted a New Jersey statute that expressly prohibited pension plans from incorporating workers' compensation offsets. *See Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3d Cir.), *cert. dismissed sub. nom. Alessi* v. *Raybestos-Manhattan, Inc.*, — U.S. —, 101 S.Ct. 25 (1980).

We have heard oral argument in the present case, and have reviewed the lengthy and comprehensive briefs that have been submitted by the parties and by the numerous *amici*. After careful consideration, we find ourselves is disagreement with the position taken by the Third Circuit in *Buczynski*, and we affirm the judgment of the district court herein. We are convinced that this result comports both with the statutory language of ERISA, and with the legislative history of the Act.

STATEMENT OF THE CASE

Plaintiffs in the present case include the Utility Workers Union of America, and its Michigan State Utility Workers Council. These plaintiffs are the labor organizations that are bargaining agents for the operating, maintenance and construction employees of defendant, Consumers Power Company. Plaintiffs also include seven individual employees of Consumers Power, each of whom receives workers' compensation benefits under Michigan law, and each of whom is eligible to receive retirement benefits under the Pension Plan for Employees of Consumers Power Company.

The facts of the present case are both straightforward and undisputed. The Pension Plan for the Employees of Consumers Power provides for the calculation and payment of normal or early retirement benefits, in section V-1 of the Plan, as follows:

V-1. Normal or Deferred Retirement Income

The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1½% for each of the first 20 years of Accredited Service.

1% for each of the next 10 years of Accredited Service.

½% for each of the next 10 years of Accredited Service. . . .

The Plan further provides, in section V-2, for the reduction of a pensioner's retirement benefits by the amount of weekly workers' compensation payments that the pensioner receives from Consumers Power or its subsidiaries under the Michigan Workers' Compensation Act, MCLA 418.101 *et seq.* (The Plan does not provide an offset for payments that are made in liquidation of claims or for payments for medical expenses that are made by Consumers Power under the workers' compensation law.) Section V-2 of the Plan reads as follows:

V-2. Workmen's Compensation. All workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The Credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments are made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

> (b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month.

The above provision for a workers' compensation offset, which was incorporated into the Pension Plan in 1966, is the subject of the present litigation.

PLAINTIFFS' ALLEGATIONS

In their complaint, plaintiffs attacked the workers' compensation offset of the Consumers Power Pension Plan on three statutory grounds:

(1) Plaintiffs alleged that the offset worked a partial or total forfeiture of benefits to which the individual plaintiffs had non-forfeitable rights, in violation of § 203(a) of ERISA, 29 U.S.C. § 1053(a).

(2) Plaintiffs alleged that the offset allowed Consumers Power to satisfy its workers' compensation liabilities out of Pension Plan assets, in violation of § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1). That section provides, in part, that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

(3) Plaintiffs alleged that the workers' compensation offset amounted to an assignment of an employee's accrued retirement benefits for the purpose of satisfying Consumers Power's liability under the Michigan Workers' Compensation Act, *supra*. Plaintiffs argued that such assignment violated § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), which reads, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Upon cross-motions for summary judgment, the district court entered judgment in favor of plaintiffs, holding that the workers' compensation offset violated the vesting and forfeiture requirements of section 203(a) of ERISA. We agree with this conclusion of the district court, and thus we do not reach the merits of plaintiffs' other two allegations.

STATUTORY PROVISIONS/TREASURY REGULATIONS

Our application of the provisions of ERISA to the workers' compensation offset now in question begins with an analysis of the minimum vesting standards that are set out in section 203 of ERISA, 29 U.S.C. § 1053. Specifically, subsection (a)(2)(A) of section 203, 29 U.S.C. § 1053(a)(2)(A), establishes the following non-forfeitability requirement:[1]

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

In interpreting the scope of this non-forfeitability requirement, several definitions that are set out in § 3 of the Act, 29 U.S.C. § 1002, are relevant. For example, 29 U.S.C. § 1002(19) provides that,

> the term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a

[1] ERISA contains certain exceptions to this non-forfeitability requirement which concededly do not apply to any of the plaintiffs in this action. *See* 29 U.S.C. § 1053(a)(3). Congress exempted from the non-forfeitability requirement of section 203(a)(2) pension plans which provide that payment shall cease if the survivor dies, plans which suspend payments while the participant is reemployed in certain types of industries, plans in which certain amendments are made retroactive, plans in which members have voluntarily withdrawn their mandatory contributions, and plans that are designed to forestall economic failure.

> participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Further, 29 U.S.C. § 1002(22) defines a "normal retirement benefit" for purposes of ERISA as "the benefit under the plan commencing at normal retirement age," and 29 U.S.C. § 1002 (23)(A) provides that the "accrued benefit" to which a pensioner receives a non-forfeitable right is "the individual's accrued benefit [as] determined under the [pension] plan. . . ."

As a part of their argument to this Court, defendants focus on the phrase "under the plan" that Congress incorporated into each of the three definitions cited above. In essence, defendants argue that a pensioner receives a non-forfeitable right only to those accrued retirement benefits that are provided by the terms of the pension plan. In other words, according to defendants, if a pension plan provides for a reduction in benefits as a part of the plan's benefit computation process, the reduced benefits are the only accrued benefits to which a pensioner gains a non-forfeitable right. We reject defendants' argument for the reason that it proves too much. As the district court correctly stated, "to hold that any forfeiture or suspension of benefits is permissible so long as it is sanctioned by the [pension] plan is to turn [ERISA's] entire statutory scheme upon its head." *Utility Workers Union* v. *Consumers Power*, *supra*, 453 F. Supp. at 452. (We note that the district court also stated that its prior decision in *Carlson*, *supra*, had "resulted from excessive attention to the phrase 'under the plan' found in the definitional section of ERISA. . . ." *Id.* at 452, n. 8.) If this Court were to accept the reasoning of defendants, a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures. Such result, however, would be contrary both to the provisions and to the spirit of ERISA. For example, it has been held that

ERISA proscribes the forfeiture of an employee's vested pension benefits when the employee, upon separation from service, engages in employment that is competitive with his former contributing employer. *See, e.g., Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008 (N.D. Ohio 1976). In light of the illegal nature of such forfeiture for competitive employment, an employer cannot legitimize the forfeiture merely by providing in a pension plan that the benefit reduction is a computational adjustment of the plan's benefit level.

On the other hand, this Court acknowledges that not every reduction in pension benefits is prohibited by the non-forfeitability requirement of section 203. To the contrary, Congress has specifically sanctioned the practice of offsetting pension benefits by the amount that a pensioner receives in social security benefits. In establishing standards for qualified pension trusts in the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A), Congress provided that,

> A trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part, in the case of a participant or beneficiary who is receiving benefits under such plan . . . such benefits are not decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act . . . .

By prohibiting a pension benefit offset for any *increase* in social security payments, Congress implicitly approved the longstanding practice of offsetting pension benefits by the amount of social security payments that a participant receives at the time of his retirement. (We note that 26 U.S.C. § 401(a)(15)(A) has a counterpart in ERISA itself, 29 U.S.C. § 1056(b)(1).) Thus, certain offsets (*i.e.*, offsets that are comparable to an offset for social security payments) are reductions in benefits that do not violate the vesting requirements of section 203.

In view of the above statutory provisions, the crux of the present appeal may be framed in the following terms: Is the workers' compensation offset that is provided in the Consumers Power Pension Plan in the nature of an offset for social security payments – an offset that Congress implicitly sanctioned in the provisions of ERISA – or is the workers' compensation offset a forfeiture that is prohibited by the broad non-forfeitability language of section 203(a)? In addressing this question, we note that Congress included in ERISA only limited exceptions to the general non-forfeitability requirement of section 203. (These exceptions are found in 29 U.S.C. § 1053 (a)(3), and none are applicable in the present case.[2]) Further, we note that the requirement of non-forfeitability is one of the essential elements of ERISA's pension reform plan. When Congress enacted ERISA, it was concerned about employees who, after years of service to their employers, were denied pension benefits on account of their pension plan's restrictive vesting requirements. In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional and non-forfeitable rights to fixed pension benefits. Accordingly, Congress incorporated into section 203 of ERISA a broad proscription against forfeitures, and it drew only a few limited exceptions to the statutory provision. The House Committee, for example, in its comments on section 203, stated unequivocally that "with the limited exceptions noted [in 29 U.S.C. § 1053(a)(3)], no rights once they are required to be vested may be lost by the employee under any circumstance. . . ." H. Rept. 93-807, 1974 U.S. Code Cong. & Admin. News, pp. 4725-6. In light of the broad non-forfeitability language of section 203, and in light of the legislative history that underlies that section, this Court will carefully scrutinize any offset or reduction in pension benefits in order to determine if the offset or reduction is a forfeiture that is prohibited by ERISA.

---

[2] *See* fn. 1, *supra*.

There is a final aspect of ERISA's statutory scheme that this Court is required to address in resolving the present appeal — namely, the regulations and rulings that have been issued by the Treasury Department on the subject of workers' compensation offsets over the past twenty-five years. In 1956, the Treasury Department issued Regulation § 1.401-4(b). That regulation pertains to section 401(a) of the IRC, 26 U.S.C. § 401(a), and to the standards set out therein that must be met by pension plans in order to qualify for favorable tax treatment. In this regulation, the Treasury Department stated that "the total benefits resulting under [a qualified pension] plan and under such [federal or state] law [must] establish an integrated and correlated retirement system satisfying the tests of section 401(a)." In other words, in the regulation, the Treasury Department recognized that pension benefits paid to a retiree may be offset by benefits provided under federal or state law, as long as the total benefits under the plan constitute "an integrated and correlated retirement system." In 1968, 1969 and 1978, the Treasury Department interpreted Regulation § 1.401-4(b), as it pertains to section 401(a), in the specific context of workers' compensation offsets. In the revenue rulings issued in these years, the Treasury Department reasoned that an offset for workers' compensation benefits was acceptable for purposes of section 401(a) because the total benefit package provided after such offset constituted "an integrated and correlated retirement system," as required by Regulation § 1.401-4(b). See Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9. As an example of its reasoning, the Treasury Department stated in Rev. Rul. 69-421, 1969-2 C.B. 59, at page 72, the following:

> . . . Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. Thus,

> benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan. However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. See Rev. Rul. 68-243, C.B. 1968-1, 157.

In 1977, the Treasury Department adopted Regulation § 1.411 (a)-4(a) – a regulation that interprets the vesting and nonforfeitability provisions of section 411 of the IRC, 26 U.S.C. § 411. That regulation reads, in part, as follows:

> For purposes of Section 411 of the Code and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable [or vested] at a particular time if, at that time and thereafter, it is an unconditional right.

The regulation continues:

> Furthermore, *nonforfeitable rights are not considered to be forfeitable* by reason of the fact that *they may be reduced to take into account benefits which are provided* under the Social Security Act or *under any other Federal or State law* and which are taken into account in determining plan benefits. [Emphasis supplied.]

Defendants herein rely heavily on the above regulations and rulings of the Treasury Department. This Court finds itself in agreement with the terms of the two regulations cited above. In essence, in Regulation § 1.401-4(b) and Regulation § 1.411(a)-4(a), the Treasury Department recognizes the validity of offsets for benefits provided under federal or state law, as long as the benefits that are offset are a part of "an integrated and correlated retirement system." We agree with this principle; however, we disagree with the Department's application of the principle in its various revenue rulings. The Department specifically addressed the issue of workers'

compensation offsets only in the revenue rulings cited above. Therein, the Department concluded that workers' compensation benefits are benefits that are a part of "an integrated and correlated retirement system." It is with this specific conclusion of the Treasury Department, found only in its revenue rulings, that this Court takes exception.

PRELIMINARY QUESTIONS

Before we examine in detail the nature of workers' compensation benefits, we must address preliminary questions that have been raised by the parties on appeal. First, plaintiffs and defendants dispute at considerable length the question of whether or not the workers' compensation offset of the Consumers Power Pension Plan was the subject of free collective bargaining. This question, no matter how it is resolved, is irrelevant. Even assuming that a challenged offset has been the subject of collective bargaining, ERISA voids all private contractual arrangements in violation of its provisions. Under the terms of ERISA, employees may seek redress for an illegal forfeiture of benefits, despite the fact that their union has consented to the forfeiture in the collective bargaining process.

Second, plaintiffs and defendants dispute what weight this Court should accord the various Treasury regulations and rulings cited above. In the recent case of *General Motors* v. *Buha*, — F.2d — (6th Cir. 1980), this Circuit held that Treasury Regulation § 1.401(a)-13 was a legislative rather than an interpretative regulation, and that as such the regulation was entitled to considerable deference by the judiciary. (Regulation § 1.401(a)-13 was issued pursuant to the authority of 29 U.S.C. § 1202(c), the section that is the authoritative basis for Treasury Regulation § 1.401-4(6) and § 1.411 (a)-4(a), *supra.*) *See also Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979). We note first that in the present case this Court is in disagreement only with the revenue rulings of

the Treasury Department (Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9), and not with the two Treasury regulations cited above. We further note that all Treasury interpretations, legislative or otherwise, must be set aside if in the interpretation "the Secretary has exceeded his statutory authority, or if the interpretation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Batterson* v. *Francis*, 432 U.S. 416, 426 (1977). In our opinion, the above-cited revenue rulings of the Treasury Department are at odds both with the statutory language of ERISA and with its legislative history.

Finally, defendants argue that Congress was aware of those Treasury Department rulings that concluded that workers' compensation offsets were allowable under the provisions of ERISA. *See, e.g., Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 92nd Cong., 2nd Sess., on Retirement Income Security for Employees Act, 1972, June 28 and 29, 1972, Part 3, pp. 997-980. In light of this, defendants conclude that Congress' failure to change the relevant statutory language of ERISA was an implicit approval of the Treasury Department interpretations. We point out that the pre-ERISA interpretations of the Treasury Department to which defendants refer pertained only to section 401(a) of the IRC – the "discrimination" section of the Code and not to those sections of the Code that relate to vesting and forfeitability under ERISA. Based in part on this fact, we conclude that these Treasury Department interpretations were not of such a longstanding nature or of such obviousness that Congressional failure to change ERISA's statutory language was tantamount to acquiescence in the administrative practice. *See Helvering* v. *Winmill*, 305 U.S. 79 (1938).

NATURE OF WORKERS' COMPENSATION BENEFITS

We now return to the central question presented on appeal: Are workers' compensation benefits and social security benefits "like" benefits for purposes of ERISA? (As indicated above, Congress has implicitly approved offsets for social security benefits in 26 U.S.C. § 401(a)(15)(A), *supra*. Thus, we assume that if workers' compensation benefits and social security benefits are "like" benefits, an offset for compensation benefits will also comport with ERISA's provisions.) This question may be rephrased to use the language of the Treasury Department: Are pension benefits, social security benefits, and workers' compensation benefits all a part of "an integrated and correlated retirement system," so that any one of the benefits may be used to offset the other under the provisions of ERISA? *See* Regulation § 1.401-4(b), *supra*.

The parties on appeal and the numerous *amici* have proposed several systems by which we can compare pension benefits, social security benefits and workers' compensation benefits. One such system is based on the so-called "common fund" doctrine. According to this doctrine, pension benefits, social security benefits and workers' compensation benefits are all like benefits because they spring from the same fund (*i.e.*, they are all paid, at least in part, by the employer). This is obviously a self-serving argument for the employer, and we find it to be of little use in the present context. The fact that an employer incurs multiple liabilities, or pays multiple benefits to an employee does not, in and of itself, make all such liabilities or benefits comparable. This "common fund" doctrine may find some support in revenue rulings such as Rev. Rul. 68-243, 1968-1 C.B. 157. Therein, the Treasury Department stated:

> The effect of section 401(a)(5) of the Code is to permit total [retirement] benefits, inclusive of those provided under the social security or similar program, to be used for comparative purposes. . . . A program, like the social

> security program, that requires employer contributions and makes benefits available to the general public is a similar program . . . .
>
> Since the benefits payable under a workmen's compensation law or occupational diseases law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

However, we first of all question the correctness of the Treasury Department's conclusion that benefits payable under the workers' compensation law are benefits that are available to the "general public." Benefits payable under a typical workers' compensation statute are available only to a subclass of employees who have sustained a work disability (other than a normal age disability) within the course of their employment. In other words, workers' compensation benefits, unlike social security benefits and pension benefits, are available only to those employees who have fallen victim to certain unexpected disabilities. Moreover, we find that the factors set out in Rev. Rul. 68-243, *supra* — the funding of the program through employer contributions, and the availability of benefits to the general public — are merely superficial aspects of the various programs that we now consider. We find that these factors do not shed any light on the fundamental nature of pension benefits, social security benefits and workers' compensation benefits, so as to aid in a determination of whether these benefits all fit within "an interated and correlated retirement system," as required by Regulation § 1.401-4(b), *supra*.

There is a second and more substantive system that defendants recommend for use in comparing workers' compensation benefits with pension and social security benefits. This system is based on what we will call the "ultimate purpose" doc-

trine. Defendants argue that workers' compensation benefits, social security benefits, and pension benefits are all like benefits, because each is intended to provide "wage loss protection" when an employee is required to retire for a reason such as age, injury, or lack of work. In support of this argument, defendants cite state case law and academic treatises that indicate that workers' compensation is no longer a tort remedy, but is now a system of wage loss protection. *See, e.g., Fielder* v. *Travelers Insurance Co.*, 79 Mich. App. 449, 263 N.W. 2d 9 (1977); *Mazor* v. *State of Maryland*, 279 Md. 355, 369 A.2d 82 (1977); 4 *Larson, Workmen's Compensation Law*, § 97.51. Plaintiffs forcefully dispute this contention that workers' compensation is designed exclusively to provide wage loss protection, and they appear to view a concession on this point as fatal to their position. Further, the district court herein was careful not to hold that workers' compensation is simply in the nature of wage replacement. Judge Pratt reasoned as follows:

> In Michigan, workmen's compensation is a comprehensive replacement of the traditional tort remedies and their attendant common-law defenses. *Cruz* v. *Chevrolet Grey Iron Div., General Motors Corp.*, 398 Mich. 117 (1976) (Opinion of Coleman, J.); *Sims* v. *R. D. Brooks, Inc.*, 389 Mich. 91 (1973). See MCLA §§ 418.131, 418.141. That this system has compensatory elements beyond mere wage replacement is evident in MCLA § 418.357 which provides for up to 50% reductions in benefits paid to persons between their 65th and 75th birthdays. Despite the relatively few individuals who can be expected to earn income during these years, the legislature has provided continued benefits for them, presumably to compensate them, at least partially, for the added burden of their occupationally acquired disability.

We tend to agree with this reasoning of Judge Pratt. However, we do not agree that defendants will necessarily prevail in this appeal if we accept the position that workers' compen-

sation benefits are merely a part of a wage replacement system. The fact that various benefits serve the same ultimate purpose necessarily does not render all of them like benefits, in terms of ERISA. For example, when an employee leaves his employer and begins work at a competitor's business, the employee may gain rights to pension benefits under the pension plan of the competitor. These new pension benefits serve the purpose of wage loss protection; yet if they are offset against the pension benefits that the employee has earned at his former employer's, the offset is an illegal forfeiture under the terms of ERISA. *See Keller* v. *Graphic Systems of Akron, Inc., supra,* (forfeitures for competitive employment violate the non-forfeitability provisions of ERISA). Likewise, an employee may take out a private insurance policy to provide him with wage loss protection on the occurrence of a disabling injury. These insurance benefits also serve the purpose of wage loss protection; however, under ERISA, these benefits could not be used to reduce the employee's pension benefits under the pension plan of his employer.

We conclude that retirement benefits are like benefits for purposes of ERISA only when the "source of their entitlement" is the same. Pension benefits and social security benefits, regardless of the event that triggers their payment (*e.g.*, age or injury), are earned on account of the years of service that the employee-beneficiary has completed. In short, the years of service are the element that gives the employee the basic entitlement to the benefits. Congress focused on this fact in ERISA. When an employee devotes a substantial portion of his working life to his employer, ERISA guarantees the employee an unconditional right to pension benefits. In other words, ERISA reflects the fact that pension benefits are in the nature of deferred compensation that the employee has earned for the years of service that he has provided his employer. When Congress defined the term "non-forfeitable" in ERISA, it used the following language:

> [T]he term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.* . . .

29 U.S.C. § 1002(19) (emphasis added). The same source of entitlement, then, is the factor that makes retirement benefits like benefits for purposes of ERISA. In other words, retirement benefits that have the same source of entitlement are all a part of "an integrated and correlated retirement system," and these benefits may be offset against each other in accordance with ERISA's provisions. *See* Regulation § 1.401-4(b), *supra.*

In conclusion, pension benefits and social security benefits are like benefits because they are both earned on account of the years of service that an employee has completed. Workers' compensation benefits, on the other hand, are not comparable in this regard. For purposes of workers' compensation law, it is irrelevant whether an employee has been at work for twenty years, ten years, five years, or one day. Workers' compensation benefits are paid solely because an employee has sustained an occupational injury within the course of his employment. Such injury is not only the event that triggers the payment of workers' compensation benefits; it is the sole source of the employee's entitlement to these benefits. Accordingly, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is not an offset that is in the nature of an offset for social security payments. That is, workers' compensation benefits are not a part of "an integrated and correlated retirement system" that properly includes pension benefits and social security benefits. To the contrary, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is an illegal forfeiture that is prohibited by the non-forfeitability provision of section 203(a) of ERISA, 29 U.S.C. § 1053(a).

CONCLUSION

Judge Pratt characterized the present case as "a tortuous struggle of inference and counter-inference drawn from a highly specialized statute and its attendant legislative history." Yet, at the same time, Judge Pratt recognized that the case touches upon human situations. This recognition is entirely consistent with the provisions of ERISA and its legislative history. ERISA was designed to eliminate the human abuses that were imposed upon employees as a result of the unfair deprivation of their pension benefits.

In this context, we make the following observations and pose the following hypotheticals. Assume that two workers, who have earned comparable wages and who have completed comparable years of service, retire. The one worker is healthy and he retires because he has reached normal retirement age. The other worker retires because he has suffered a severe work-related injury that renders him totally disabled. The injured worker receives workers' compensation benefits; however, his total benefit package remains the same because his pension benefits are reduced by his workers' compensation benefits. The healthy worker, on the other hand, receives the identical benefit package, but remains free and able to supplement his pension benefits by post-retirement work. As another example, assume that a worker who is eligible for pension benefits is totally disabled in a work-related accident. If the worker receives workers' compensation benefits, he will experience a dollar-for-dollar reduction in his pension benefits. Why should this worker file an action under a workers' compensation statute? In their brief, defendants provide an answer to this question. They point out that it is preferable from a tax point of view to receive workers' compensation benefits as opposed to pension benefits. To be kind, we find defendants' answer to be unpersuasive.

The above hypotheticals are typical of real-life situations that would occur if defendants' position on appeal were accepted by this Court. Yet, these situations are the very ones

that ERISA sought to eliminate. They call to mind the specialized and technical legal terms that are applicable in this case – "chilling of the right to bring a workers' compensation suit," "a penalty," "a forfeiture." Judge Pratt depicted the human element in the case in the following cogent terms:

> Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement. See, e.g., *Mosley* v. *National Maritime Union Pension and Welfare Plan, supra.* A pension plan participant must labor for the employer for a period of time before acquiring vested benefits. Upon attainment of retirement age, he or she is entitled to the agreed-upon payments. A retiree receiving pension benefits who does not have a compensable disability is in a far different position than a retiree who has, for example, lost a limb. To hold as defendants contend, that each of these two hypothetical individuals is meant to receive the same post-retirement compensation is excessively short-sighted. A person who has lost his leg has suffered a greater disruption of his life than merely diminution of his earning capacity. If the Court were to accept the defendants' argument, both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

We find Judge Pratt's reasoning to be accurate and persuasive. We affirm the district court's grant of summary judgment in favor of plaintiffs, for the reasons stated above.

ENGEL, Circuit Judge, dissenting. I respectfully dissent. I find more persuassive the opinion of Judge Garth in *Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3rd Cir. 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980). In *Buczynski* Judge Garth makes an extensive review of the legislative history of ERISA and concludes that Congress gave its implicit approval to the prior IRS practice of allowing offsets for workers' compensation benefits. Given the breadth of the Social Security program, Judge Garth also concludes that Congress approved offsets for disability benefits.

In my opinion, the result reached by the majority's construction of ERISA is inflexible, and is at odds with the statutory and regulatory scheme. The plain language of the pension plan for the employees of Consumers Power Company, which the union now seeks to repudiate, is not inconsistent with the provisions of ERISA, but on the contrary is consistent with the eligibility requirements under the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A) (1976), and with its counterpart in ERISA, 29 U.S.C. § 1056(b)(1) (1976). Both our circuit, in *General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980), and the Third Circuit in *Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979), have recognized that Treasury Regulation § 1.401(a)-13 is a legislative rather than an interpretative regulation and as such is entitled to considerable deference by the judiciary. That regulation provides in part:

> Furthermore, non-forfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other federal or state law and which are taken into account in determining planned benefits.

The majority, which states that it "finds itself in agreement" with the terms of the cited regulation, nonetheless holds that the regulation is not applicable to state laws providing for workmen's compensation benefits. In support thereof it asserts

that it is not bound by the revenue rulings of the Treasury Department, which more particularly recognize that workmen's compensation law and occupational disease law, being available to the general public, are acceptable as an offset against benefits payable under a qualified pension plan. *See Revenue Ruling* 67-243 (1968) – 1 C.B. 157.

While I readily recognize that a Treasury Department Revenue Ruling does not have the force of the regulation, it is in my opinion entirely consistent with the regulation itself and with the overall statutory scheme. It is true that workmen's compensation laws partake both of "wage loss protection" as well as an historic remedy in tort. While admittedly the issue is not without difficulty, in my opinion the majority opinion fails to refute the reasoning of Judge Garth and his recognition that workmen's compensation is in very real measure much like social security in the breadth of its coverage. *See Buczynski* v. *General Motors Corp., supra,* 616 F.2d at 1246-47.

In my opinion, the district court and the majority here appear overly concerned with the potential impact which the receipt of workmen's compensation benefits will have upon non-forfeitability where those benefits are to be received even after normal retirement age. While this is, in a sense, true, it is no more true in the case of workmen's compensation than it is with social security, and thus in my opinion it is not inconsistent with the intent of the statutory scheme. It would seem to me that the litigants ought to be as much concerned with the very direct threat to the stability of the pension plan itself by the impact of the majority's decision upon the integrity of the fund and its capability for providing real benefits to the workers at Consumers Power upon their retirement. The temporary benefits which a few may gain by the benefit of this "double dipping" must inevitably be offset by the economic realities that in the future the impact is bound to be felt in the financial weakening of an otherwise sound pension system. ERISA is a most useful addition to the body of

American law which is designed to protect the working man against forfeiture of pension rights. The interpretation given the Act by the Third Circuit is, in my opinion, to be preferred because it retains flexibility, avoids potential abuse, while fully protecting the objective of the Act in assuring income protection in a variety of circumstances.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UTILITY WORKERS UNION
OF AMERICA, et al,

Plaintiffs,

vs.

CONSUMERS POWER COMPANY,
and the PENSION PLAN FOR
EMPLOYEES OF CONSUMERS
POWER COMPANY,

Defendants.
_____/

CIVIL ACTION

NO. 7-71747

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The individual plaintiffs are former employees of defendant Consumers Power Company and participants in defendant Plan who currently have their privately funded retirement benefits reduced because of deductions or offsets for payments received under the Michigan Workers' Compensation Act. The individual plaintiffs seek to represent a class of similarly

situated Plan participants.[1] The Union, which is the authorized collective bargaining agent for the employees of Consumers Power Company, seeks to maintain this action on behalf of its membership.

The complaint alleges that the Consumers Power Company's Pension Plan policy of offsetting pension benefits in an amount equal to the workmen's compensation benefits received by an eligible retiree on a monthly basis[2] violates the Employees Retirement Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. Specifically, the plaintiffs claim that the provision relating to workmen's compensation offsets (1) operates as a forfeiture in violation of 29 U.S.C. §1053(a); (2) improperly reduces the company's funding obligation in violation of 29 U.S.C. §1103(c)(1); and (3), in effect functions as an assignment of pension benefits contrary to the pro-

---

[1]None of the parties have filed a motion relating to class certification as required by FRCP 23(c)(1). Inasmuch as the class aspects of this litigation have no bearing on the liability issues, the Court can properly postpone consideration of class-wide relief until after a decision on liability.

[2]Section V(2) of the Pension Plan provides that monthly pension payments will be reduced in an amount equal to workmen's compensation benefits paid in the preceding month. Under no circumstances, however, will the monthly offset exceed the amount of normal pension benefits due for the month in which the workmen's compensation payments were made. Thus, no single monthly offset can ever be applied to more than one month of pension benefits. To the extent that workmen's compensation payments exceed the pension benefit in any month, neither the Plan nor the workmen's compensation fund can recover the difference.

of pension benefits contrary to the provisions of 29 U.S.C. §1056(d)(1). The plaintiffs seek a declaration that the portions of the pension plan which provides for workmen's compensation offsets violates ERISA; that further implementation of the provision be enjoined; and that they be awarded recovery of pension benefits improperly withheld. There are no disputed issues of fact. The parties have filed cross-motions for summary judgment and extensive briefs.

This case presents the Court with difficult issues of statutory interpretation. The problems a Court ordinarily confronts in construing a Congressional enactment are increased here by the fact that the intricacies of the recent, sweeping revision of the law relating to pensions embodied in ERISA must be considered in conjunction with the state workmen's compensation system. Since neither Congress nor any court has spoken directly to the subject,[3] the parties have requested

---

[3]The only case presented to the Court which considers the precise issue raised in this lawsuit is Carlson v. Bundy Manufacturing Co., Civ. No. 6-72274 (E.D. Mich. Aug. 18, 1977) in which this Court found the offset to be permissible. There, however, the legal issues were briefed much less extensively. Both parties agree that the Court should examine the issues fully in the context of the instant case. The most expeditious way to do this is to proceed without further reference to the Carlson opinion which is, in any event, a much more superficial exploration of the question than is evident in the record of this litigation.

the Court to turn to the language of ERISA and the legislative history to determine whether the intent of the Act was to permit the type of pension offset contained in the Consumers Power Pension Plan.

As with many challenging legal problems, this one has its genesis with a common, everyday occurrence--the payment, or rather non-payment, of money. Thus, it is useful to review the practical aspects of the dispute before undertaking an analysis of the technical legal issues involved. In this way the controversy will have a familiar context which may be borne in mind thoughout the remainder of what to this Court is, at times, a tortuous struggle of inference and counter-inference drawn from a highly specialized statute and its attendant legislative history.

The Court is asked, in effect, to decide how much money certain pensioners should receive in their monthly checks, or, conversely, how much money the Plan must pay out in benefits to certain of its participants. Plaintiffs would have the Court require the payment without any offset of full pension benefits to those retirees covered by the Plan who also happen to qualify for workmen's compensation benefits. The defendant objects that such a requirement would result in an unconscionable windfall to plaintiffs. It is clear from the record that striking down the offset could result in some individuals receiving combined pension and workmen's compensation benefits that exceed the salary they earned while working.

Defendant seeks Court approval of the offsets as a rational response to the problem of multiple post-retirement payments from the same funding source.[4] The plaintiffs, for their part, object that this result would completely vitiate the workers' protection purposes which were motivating factors in ERISA's enactment. Plaintiffs fear that approval of this offset would be the opening wedge in a series of increasingly offensive money saving pension plan clauses.[5]

STANDING TO SUE

Preliminarily, the defendants argue that the Union is not a proper party plaintiff to this action. The Union, as exclusive collecting bargaining representative for the individual plaintiffs, argues that it has standing to maintain this action under Section 1041(a) of ERISA, 26 U.S.C. §7476(b)(2), which gives the Union a right to make comments on advance applications for Internal Revenue Service Qualification for pension plans.

This action is brought under 29 U.S.C. §1132. Under subsection (a), civil actions may be brought by Plan participants, Plan beneficiaries, the Secretary of Labor or Plan fiduciaries. Plan par-

---

[4]It is agreed by the parties that Consumers Power Company funds the entire cost of both the workmen's compensation premiums and the pension plan involved in this litigation.

[5]For example, plaintiffs contend that the defendants' logic would require approval of plan clauses which offset benefits for all manner of non-job-related conduct, such as speech or leisure-time activities.

ticipants are defined in 29 U.S.C. §1002(7), Plan beneficiaries in 29 U.S.C. §1002(8), and Plan fiduciaries in 29 U.S.C. §1002(21). Each of these categories of entities is different than an employee organization, which is defined in 29 U.S.C. §1002(4) as

> "any labor union or any organization of any kind . . . which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan or other matters incidental to employment relationships."

The Union is concededly an employee organization within the meaning of ERISA. However, an employee organization is not mentioned in §1132(a) as one of the persons or entities qualified to bring civil actions to remedy violations of the Act. Given the detail of the statutory scheme and the precise language chosen by Congress, the Court is persuaded that the Union lacks standing to sue under ERISA for the relief requested here. The individual plaintiffs are clearly entitled to sue under 29 U.S.C. §1132(a)(1), (3), (4). Had Congress intended to confer the right to sue on an employee organization it would have said so. The Union must be dismissed as a party plaintiff.

FORFEITURE

It is necessary to set forth two provisions of the pension plan and one portion of ERISA to understand the nature of the plaintiffs' claim in this action. Section V(1) of the Plan says:

"The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1-1/2% for each of the first 20 years of Accredited Service;

1% for each of the next 10 years of Accredited Service;

1/2% for each of the next 10 years of Accredited Service."

Section V(2) of the Plan describes the workmen's compensation offset:

"All Workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments were made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

> (b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month."

Plaintiffs argue that the Plan provisions, particularly Section V(2), contravene the terms of Section 203 of ERISA, 29 U.S.C. §1053, in which Congress enacted a broad scheme regulating minimum vesting standards for pension plans covered by the Act. Subsection (a)(2)(A) of Section 203, 29 U.S.C. §1053(a)(2)(A), sets out a specific nonforfeitability requirement:

> "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions."

ERISA contains several exceptions to this nonforfeitability requirement which concededly do not apply to any of the individual plaintiffs in this action. 29 U.S.C. §1053(a)(3).[6]

---

[6]Congress exempted from the nonforfeitability requirement plans which provide that payment shall cease if the survivor dies, plans which suspend payments while the participant is reemployed in certain types of industries, where certain amendments are made retroactive, where plan members have voluntarily withdrawn their mandatory contributions and to forestall economic failure of a plan.

Initially the plaintiffs argue that the Court need look no farther than Section V(1) of the Plan to find that the workmen's compensation offset is a forfeiture. Plaintiffs contend that both the "normal retirement benefit" and the "accrued benefit", as those terms are used in Section 203(a) of ERISA are fully defined in Section V(1) of the Plan. Failure to pay the benefits defined in that section, they reason, is necessarily a forfeiture within the meaning of the Act. Plaintiffs' logic is made complete by the agreed-upon fact that as to them the defendant has adhered to the offset provisions of Section V(2).

In plaintiffs' view Section V(2) and the other subsections of Section V[7] are merely formalistic provisions which arithmatically dictate the amount of each monthly check. Thus, plaintiffs interpret the Plan so that only Section V(1) states the amount of plan benefit, with the remaining sections being without significance to ERISA. Plaintiffs argue, in effect, that it is unnecessary to determine whether the offset provision per se is a forfeiture since failure to pay the normal retirement benefit as set forth in Section V(1) is clearly a forfeiture under the Act. Defendants argue, in opposition, that the Plan's normal retirement benefit, as that term is used in ERISA, is the sum to be paid a plan participant taking into account all parts of Section V of the Plan.

---

[7]Subsection 3 describes early retirement income, subsection 4 supplemental retirement income, subsection 5 minimum pension income, subsection 6 maximum retirement income and subsections 7 and 8 discuss the manner in which payments will commence and terminate.

Congress has defined "accrued benefit" to mean "the individual's accrued benefit determined under the plan . . ." 29 U.S.C. §1002(23)(A). "Normal retirement benefit", under the Act means "the benefit under the plan commencing at normal retirement age." 29 U.S.C. §1002(22). The Plan itself defines "retirement income" as "the monthly retirement income provided for by this Plan." Plan Section I, p. 4. Section V(2) is clear that the workmen's compensation offset "will be a credit against any Retirement Income or any other payments under this Plan." Thus, while the Plan is not specific as to what its draftsmen conceived to be the "normal retirement benefit" and the "accrued benefit", as those terms are employed in ERISA, there is no doubt that the normal pension payment calculation includes the offset.

When construing a contract the Court must look to the document as a whole. Here, the Plan speaks of "retirement income" in terms of amounts payable. Section V is a comprehensive provision relating to the computation of retirement benefits. The benefits payable under Subsection 1 cannot logically be separated from the remaining portions of Section V. Accordingly, the Court concludes that the normal retirement benefit under the Plan and the accrued benefit under the Plan are the benefit payments called for by the entire computation process of Section V. The plaintiffs may not prevail simply on

the theory that Section V(1), standing alone, requires full payment to them of the sums they seek.[8]

This conclusion, however, merely starts the process of inquiry; it does not end it. Having determined that the Plan treats the workmen's compensation offset as an integral part of the normal retirement benefit, the question arises whether the offset violates the nonforfeitability provisions of 29 U.S.C. §1053. It is not enough to merely determine that the Plan defines the normal retirement benefit as a certain sum, less any offset, and then conclude that the Plan beneficiary has received all he is entitled to. It is necessary to inquire into the nature of the offset to see if it violates the Act. This much is clear from Keller v. Graphic Systems of Akron, Inc., 422 F.Supp. 1005 (N.D. Ohio 1976). In that case the plan provided that benefits would be forfeited if an employee resigned and then went to work for any of the defendant's competitors. A former employee sued to recover his benefits when he reached early retirement age. While the case was governed by

---

[8]This argument may well be an attempt by the plaintiffs to distinguish the instant case from Carlson v. Bundy, supra, where the Court held that there was no forfeiture because those retirees received all the payments they were entitled to under the plan. The conclusion the Court reached in Carlson, that an offset contained in a plan, if reasonable, is permissible, resulted from excessive attention to the phrase "under the plan" found in the definitional section of ERISA, 29 USC §1002(22), (23). The proper question is not whether the plan's provisions are reasonable, but whether they are contrary to the statute. See discussion on pages 8 and 9, infra.

the effective date provisions of ERISA the court did observe that:

> "It would therefore appear that ERISA proscribes the forfeiture of an employee's vested rights to qualified plan benefits for engaging in employment competition with his former contributing employer upon separation from service." Id. at 1008.

Accord: Lewis v. Merrill Lynch Pierce Fenner & Smith, 431 F.Supp. 271 (E.D. Pa. 1977); Amory v. Boyden Associates, 434 F.Supp. 671 (S.D. N.Y. 1976). To hold that any forfeiture or suspension of benefits is permissible as long as it is sanctioned by the plan is to turn the entire statutory scheme upon its head.

A nonforfeitable claim is one

> "obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional and which is legally enforceable against the plan."

Plaintiffs' argument, stripped to its essentials, is that they have an unqualified right to their normal retirement benefit, which is aptly defined in Section V(1) and that the workmen's compensation offset imposes a condition on entitlement to that benefit which violates Section 203 because it does not come within one of the exceptions set out at 29 U.S.C. §1053(a)(3).

Plaintiffs' position finds considerable support in Riley v. MEBA Pension Trust, 570 F.2d 406 (2d Cir. 1977). The

plaintiff in Riley had been a port engineer for a shipping line for many years. Prior to his retirement he wrote the trustees of his pension plan to inform them he was being considered for a position with the U.S. Department of Commerce, Maritime Administration. He requested a waiver of a provision of the pension plan which stated that subsequent employment in the maritime industry would preclude payment of retirement benefits for the duration of his second employment. The trustees refused the waiver. After accepting the civil service job, he filed suit. The Second Circuit, per Judge Friendly, held that the fact that benefits were "suspended" instead of "terminated" was of no legal significance. As far as Mr. Riley was concerned the suspended benefits would never be paid to him. The Court ruled that:

> "as regards employer contributions, the employee's rights must be nonforfeitable if he has met certain conditions relating to age and years of service which Riley concededly has done. Section 3(19), 29 U.S.C. §1002(19), defines 'nonforfeitable' as meaning, among other things, a claim 'which is unconditional and which is legally enforceable against the plan.' The provision of Article II A, §13, quoted above, fn. 2, places a condition on Riley's claim to the monthly benefits to which he otherwise would be entitled and makes his claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA." Id. at 409.

With respect to the purposive argument made by those defendants that the decision for plaintiff would result in a windfall, and thus was not intended by Congress to be a forfeiture,[9] the court said:

> "It is true that employment by the government in a task similar to that which port engineers perform for private employers may involve the same evil of 'double-dipping', i.e., a pensioner's taking a job that would otherwise have been available to a member of the union who had not retired, as private employment would. The Trustees say that this was the evil at which Art. II A, §13 was aimed, and they argue that §203(a)(3)(B)(ii) [29 USC §1053(a)-(3)(B)(ii)] should be construed accordingly. But it would be sheer speculation to assume that Congress wished courts to depart so far from the ordinary meaning of its language; for all we known Congress might have been happy to have a body of skilled pensioneers willing to work for the Government at federal salaries." Id. at 410.

---

[9]The defendant argued that the case fell within one of the exceptions to the forfeiture requirement, that of later employment in the same industry, 29 USC §1053(a)(3)(B)(ii). The court rejected this defense preferring to treat the language "same industry" in a colloquial, rather than a technical sense. Thus, working for the government in the maritime field was not employment in the same industry as a private shipping line. Defendants in the case at bar do not argue that the workmen's compensation offset falls within the terms of 29 USC §1053(a)(3).

The parties are in serious disagreement as to the persuasive force of Riley. The plaintiffs contend that the case stands for the proposition that Section 203 must be strictly construed against a forfeiture. This reading of Riley focuses on the importance of permitting no condition subsequent to entitlement to benefits that are not specifically allowed by statute. Seen from this perspective the case at bar is easy to resolve. Congress has outlawed most subsequent limitations on the right to receive pension benefits, the workmen's compensation offset is such a condition subsequent, and it is not within the permitted exceptions of 29 U.S.C. §1053(a)(3). Defendants argue that Riley is distinguishable from the case at bar because it involves a complete evasion of all pension obligations due to the employee's relationship to a third party. Here, defendants say, the plaintiffs' post-retirement income comes from the same funding source. The fact that the post-retirement payments come from different funds should not, in defendants' view, obscure the fact that, from one source or another, the defendants are paying an amount equal to the sum called for in Section V(1) of the Plan. A necessary entailment of defendants' position is that offsets which relate to state statutes, including the workmen's compensation acts, are different from offsets triggered by private sector considerations.

The legislative history accompanying the enactment of ERISA is hardly conclusive as to Congress' conception of the propriety of workmen's compensation offsets. It is clear that the law was enacted

for the benefit of employees who had been victimized by inequitable plan provisions, or poorly funded plans. In its preamble to the Act, the Congress said its purpose was to

> "protect interstate commerce, the taxing power and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. §1001(c).

Commenting on Congress' purpose, one court has observed:

> "Our analysis begins by way of background, with the findings of Congress concerning the vesting requirements of the post-World War II private pension plans. Vesting refers to the nonforfeitable interest that an employee acquires in a pension plan, entitling him to pension benefits . . .. [A common failing of pre-ERISA plans was that] if service terminated prior to meeting the age or service requirements, many employees were denied benefits despite many years of employment, creating vividly documented 'difficulties and hardships.' The denial of pension benefits under such circumstances is, moreover, particularly inequitable since 'the pension contributions previously made on behalf of

> the employee may have been made in lieu of additional compensation or some other benefits which he would have received . . .' The employee excluded from a pension thus gets the worst of both worlds: he works for years at a diminished salary in order to contribute to a pension fund and then, because of the failure to meet a restrictive vesting requirement, he is denied all pension benefits. The Congressional response to the abuses of employees by pension plans was to impose on private pension plans minimum vesting requirements that involve either graduated vesting or a relatively short service requirement prior to 100% vesting." Mosley v. National Maritime Union Pension & Welfare Plan, 438 F.Supp. 413, 423-4 (E.D. Pa. 1977) (citations omitted). See Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294, 1297 (N.D. Cal. 1977).

This concern for the plight of the worker apparently prompted the broad non-forfeitability language of Section 203(a). The House Committee said:

> "With the limited exceptions noted above, no rights once they are required to be vested may be lost by the employee under any circumstances . . . For example, a vested benefit is not to be forfeited because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H. Rept. 93-807, 1974 U.S. Code Cong. & Adm. News 4725-6. See also H. Conf. Rept. 93-1280, 1974 U.S. Code Cong. & Adm. News 5052.3.

On the other hand there is language in the various reports which indicates that Congress may have been more concerned to ensure that workers would find at least minimal financial support upon their retirement than with any desire to prohibit forfeitures in all forms.

> "Its most important purpose will be to assure these workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." H.Conf. Rept. 93-533, 1974 U.S. Code Cong. & Adm. News 4646. See H. Rept. 93-807, 1974 U.S. Code Cong. & Adm. News 4719.

In addition to this inconclusive picture from the legislative history, the Court must necessarily consider the sections of ERISA which integrate the Social Security Act into the national pension laws. In creating standards for qualified trust status for pension plans Congress said:

> "A trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part, in the case of a participant or beneficiary who is receiving benefits under such plan . . . such benefits are not decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act . . ." 26 U.S.C. §401(a)(15)(A).

This section has its counterpart in ERISA itself, 29 U.S.C. §1056(b)(1).[10] Congress thus considered the relationship between some other statutory schemes and ERISA, prohibited certain offsets, but said nothing about others. Is the Court to conclude from this that the failure to prohibit workmen's compensation offsets should be understood as approval of the practice? This would be going too far. It is true that Congressional silence in this case is not positive evidence of an intention to outlaw the offset. Neither, however, is it a positive indication of an intention to approve it. At best, the Court can conclude only that Congress spoke to the relation between certain federal retirement programs and ERISA. Its failure to refer to any state-mandated insurance programs cannot, in view of the policy of federalism and comity, be treated as any conclusive indicia of intent.[11]

---

[10]The text of the two statutes is almost identical. The only difference is that in Title 29 the Congress prohibited deductions for benefits payable under the Railroad Retirement Act of 1937 in addition to the Social Security Act.

[11]This conclusion is especially strong in view of Congress' silence as to state workmen's compensation programs despite its presumed knowledge of their existence.

Nor do regulations by the Secretary of the Treasury compel a different result. The defendant points to Treasury Regulation 1.411(a)-4(a), (continued on page 43)

The Court must look, as well, to the nature of workmen's compensation programs to discern the intent of Congress in this area. Different types of insurance programs serve differing needs of the American worker. Unemployment insurance reimburses a worker for loss of income due to non-medical causes; disability insurance compensates workers for lost income due to non-occupational illness; and workmen's compensation laws protect workers against the loss of income due to work-related illness. Standard Oil of California v. Agsalud, 442 F.Supp. 695 (N.D. Cal. 1977). In Michigan, workmen's compensation is a comprehensive replacement of the traditional tort remedies and their attendant common-law defenses. Cruz v. Chevrolet Grey Iron Div., General Motors Corp., 398 Mich. 117 (1976) (Opinion of Coleman, J.); Sims v. R.D. Brooks, Inc., 389 Mich. 91 (1973). See MCLA §§418.131, 418.141. That this system has compensatory elements beyond mere wage replacement is evident in

---

Footnote [11] continued from page 42:

adopted in 1977, which provides: "Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security act or under any other Federal or State law and which are taken into account in determining plan benefits."

The Court cannot accept the contention of defendants that the Secretary of the Treasury has been given authority to make final interpretations of the statute. Nor can the Court say that this regulation is either of such long-standing or of such obviousness that failure to change the language by statute amounts to Congressional acquiensence in some administrative practice. See Helvering v. Winmill, 305 US 79 (1938).

MCLA §418.357 which provides for up to 50% reductions in benefits paid to persons between their 65th and 75th birthdays. Despite the relatively few individuals who can be expected to earn income during these years, the legislature has provided continued benefits for them, presumably to compensate them, at least partially, for the added burden of their occupationally acquired disability.

Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement. See, e.g., Mosley v. National Maritime Union Pension and Welfare Plan, supra. A pension plan participant must labor for the employer for a period of time before acquiring vested benefits. Upon attainment of retirement age, he or she is entitled to the agreed-upon payments. A retiree receiving pension benefits who does not have a compensable disability is in a far different position than a retiree who has, for example, lost a limb. To hold as defendants contend, that each of these two hypothetical individuals is meant to receive the same post-retirement compensation is excessively short-sighted. A person who has lost his leg has suffered a greater disruption of his life than merely diminution of his earning capacity. If the Court were to accept the defendants' argument, both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

The defendant asks the Court to deny the injured worker, who otherwise qualifies for workmen's compensation benefits,

any such compensatory payments in the face of unambiguous statutory language which disapproves of any forfeiture.[12] The justification for this exception to the anti-forfeiture language of ERISA is the inference that since Congress explicitly approved offsets for Social Security payments, it must have intended to permit offsets for workmen's compensation payments. This inference, in turn, rests on the supposition that Congress meant to free employers from the responsibility of making duplicative payments. Defendants' reasoning, however, is not convincing. As previously indicated, Congress has set forth a broad rule of non-forfeitability and then provided certain limited exceptions to it. In Riley and Keller this Congressional language has been construed in favor of workers. The Court is persuaded that Congress did not intend to exempt workmen's compensation payments from the non-forfeitability requirement of ERISA. Just as in the Riley case, the workmen's compensation offset provision of this pension plan places a condition on the plaintiffs' claim to monthly benefits which makes that claim legally unenforceable against the plan. It therefore constitutes a forfeiture as that term is used in ERISA. The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative.

---

[12]As a technical matter, of course, the plaintiffs are not denied their workmen's compensation payments, but rather their pension is reduced an equivalent amount. Functionally, the result is the same as if the workmen's compensation payments were withheld. Significantly for purposes of this case, the method of the offset brings the case squarely within the contours of ERISA's forfeiture provisions.

The Court chooses to follow the plain meaning of the statutory language. Plaintiffs are entitled to summary judgment.[13] The plaintiffs' motion for summary judgment is therefore granted, and the defendants' motion for summary judgment is denied. The Utility Workers Union of America is dismissed as a party plaintiff. Entry of judgment will be withheld pending the resolution of the class aspects of this litigation.

IT IS SO ORDERED.

PHILIP PRATT
United State District Judge

Dated: June 13, 1978
Detroit, Michigan

---

[13]This determination makes it unnecessary to consider plaintiffs' other claims that the offset provision contravenes ERISA.

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

INTERNAL REVENUE CODE OF 1954, Sec. 401(a)(5) (26 U.S.C. §401(a)(5) after amendment by ERISA (P.L. 93-406):

> (5) A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b) (without regard to paragraph (1)(A) thereof) merely because it excludes employees the whole of whose remuneration constitutes "wages" under section 3121(a)(1) (relating to Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employees under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from "wages" by section 3121(a)(1) differ from the contributions or benefits based on an employee's remuneration not so excluded, or differ because of any retirement benefits created under the State or Federal law. For purposes of this paragraph and paragraph (10), the total compensation of an individual who is an employee within the meaning of subsection (c)(1) means such individual's earned income (as

defined in subsection (c)(2)), and the basic or regular rate of compensation of such an individual shall be determined, under regulations prescribed by the Secretary, with respect to that portion of his earned income which bears the same ratio to his earned income as the basic or regular compensation of the employees under the plan bears to the total compensation of such employees. For purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate. For the purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take ac-

count of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates.

EMPLOYEES RETIREMENT INCOME SECURITY ACT, Sec. 203(a) (29 U.S.C. §1053(a)):

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection. ...

INTERNAL REVENUE CODE OF 1954, Sec. 411 (26 U.S.C. §411):

SEC. 411. MINIMUM VESTING STANDARDS.

(a) GENERAL RULE.---A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age (as defined in paragraph (8)) and in addition satisfies the requirements of paragraphs (1) and (2) of this subsection...

EMPLOYEES RETIREMENT INCOME SECURITY ACT, Sec. 3(19) (29 U.S.C. §1002(19)):

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate

or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

INCOME TAX REGULATION, Sec. 1.411(a)-4 (26 CFR Sec. 1.411(a)-4):

§1.411(a)-4 Forfeitures, suspensions, etc.

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being

forfeitable. Rights which are conditioned upon a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse towards satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation. Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits....

PENSION BENEFIT GUARANTY CORPORATION REGULATIONS, Sec. 2605.2 (29 CFR §2605.2):

"Pension benefit" means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently left covered employment, or to a surviving beneficiary, which payments by themselves or in combination with Social Security Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1674

CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,

Petitioners,

vs

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS and PAUL DeHATE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THEODORE SACHS

I. MARK STECKLOFF

Attorneys for Respondents
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

THE INLAND PRESS, DETROIT, MICHIGAN

105

COUNTER-STATEMENT OF QUESTION PRESENTED

Does a provision in Petitioners' pension plan, which deducts all or a portion of the vested retirement benefits otherwise payable to a plan participant by the amount he subsequently receives as worker's compensation benefits, violate the vesting and nonforfeitability provisions of Sections 203(a) and 3(19) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 153(a) and 29 USA 1002(19)?

PARTIES TO THE PROCEEDING

The names of all the parties to this proceeding are contained in the caption of the case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
COUNTER-STATEMENT OF THE CASE 1
REASONS FOR DENYING THE WRIT 6
CONCLUSION 9

TABLE OF AUTHORITIES

Page

Alessi v *Raybestos-Manhattan, Inc.*, 616 F.2d 1238 (CA 3, 1980) U.S. Supreme Court No. 79-1943 8

Buczynski v *General Motors Corp.*, 616 F.2d 1238 (CA 3, 1980), U.S. Supreme Court No. 80-193 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980
No. 80-1674

CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,
Petitioners,

vs

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS and PAUL De HATE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 637 F.2d 1082 (1981). The opinion of the District Court is reported at 453 F. Supp. 447 (1978).

COUNTER-STATEMENT OF THE CASE

Because appellants' "Statement of the Case" is inaccurate and unfairly abridged, appellees submit this counter-statement.

Plaintiffs-Respondents, Utility Workers Union of America, AFL-CIO, and its Michigan State Utility Workers Council

(hereinafter, together, the "Union"), are labor organizations which are the exclusive bargaining agent, with certain exceptions, for the operating, maintenance and construction employees of Defendant-Petitioner, Consumers Power Company (hereinafter the "Company" or "Employer"). Individual Plaintiffs-Respondents, Tinklepaugh, Segorski, Lingram, Clough, Yon, Rogers and DeHate, are retired employees of the Company and are "participants," under §3(7), 29 USC 1002(7), of the Employee Retirement Income Security Act (ERISA), in Defendants-Petitioners' Pension Plan for Employees of Consumers Power Company (hereinafter "Plan" or "Pension Plan"). Each individual plaintiff is eligible to receive retirement benefits under Petitioners' Plan.

The calculation and payment of each Plan participant's retirement benefit ("Retirement Income") is based solely on his years of service and final average compensation. The operative section of the Plan (VII-3), which incorporates the vesting requirements of ERISA §203(a), promises that an employee with ten years of credited service "will receive, commencing at Normal Retirement Date, Retirement Income equal to 100% of his Accrued Retirement Income." This accrued benefit — the "Accrued Retirement Income" — which he is to receive in full after working ten credited years — is defined by the Plan as the amount of retirement income which he has earned under the years of service calculation of another Plan section (V-1):

> "With respect to any employee at any particular date, the Retirement Income beginning at Normal Retirement Date which would be payable to such employee at the rates provided in sub-section 1 of Section V, on the basis of his Accredited Service rendered to the date of the computation, limited, however, by the provisions with respect to transfer in subsection 8 of Section III and by the provision with respect to maximum Retirement Income in subsection 6 of Section V."[1]

[1] Neither of these two enumerated Plan sections — the only limitations on the Plan's calculation of the retirement benefit — includes offsets for worker's compensation.

Finally, Section V-1 of the Plan provides pertinently:

"V-1. Normal or Deferred Retirement Income

The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1½% for each of the first 20 years of Accredited Service.

1% for each of the next 10 years of Accredited Service.

½% for each of the next 10 years of Accredited Service . . ."

Even though the foregoing provisions describe the entire benefit calculation and payment formula under the plan, an entirely separate Plan section (V-2) provides that the participant's benefit calculated under the plan will not be fully paid if he subsequently receives worker's compensation payments from the Company or its insurer:

"V-2. Workmen's Compensation. All Workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The Credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments are made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

(b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month."

Plaintiffs-Respondents submit, and the appellate and district courts held, that this provision effects a forfeiture of vested rights prohibited by ERISA §203(a).

Because of the challenged worker's compensation offset provision here at issue, individual plaintiffs, all of whom are retired, now or will suffer substantial and total losses of their retirement pensions, contrary to Petitioners' assertions (p. 5).[2]

There is nothing in the Plan which forfeits the retirement benefits of able-bodied employees on account of income from other employment, which retirees are free to earn.

In contrast to its enormous impact on affected workers, the record evidence demonstrates that the effect of the offset on the Company's funding obligations to the Plan is actuarially insignificant.

Although the Pension Plan was unilaterally established by the Company in 1944, the worker's compensation offset provision first appeared in the Plan in 1966. Consequently, during most of their working careers with the Company, the individual plaintiffs accrued pension benefits under the Plan's years of service calculations expecting no possibility of benefit reduction for worker's compensation.

---

[2]Plaintiff Paul DeHate retired from the Company with 27 years of service following knee and spinal injuries for which he is receiving worker's disability benefits. He has consequently lost his entire $430 monthly pension.

Plaintiff Robert Yon, who retired from the Company in 1976 after 31 years of ervice, has similarly lost his full monthly pension of well over $300 because he is receiving worker's compensation for a broken leg and hip and knee damage suffered in 1975.

Plaintiff Burnell Clough retired with 25 years' service effective October, 1976. He receives $105.00 weekly in worker's disability benefits for massive injuries from a 46,000-volt electrocution and subsequent long fall, but his accrued vested pension of $226 monthly has been wiped out.

Plaintiff Leo Lingram has similarly forfeited his entire pension because he is receiving $106.40 weekly under worker's compensation.

Finally, Ray Rogers, Clarence Segorski and Lewis Tinklepaugh are currently processing worker's compensation claims at the time of this lawsuit. If "successful," Rogers stands to have his pension forfeited entirely or reduced by approximately $156 per month; Tinklepaugh would lose his entire monthly pension payments.

Contrary to the Petition, the Plan is not "collectively bargained." The Plan covers all regular full-time employees of the Company, including unorganized employees, and not just those bargaining unit members represented by the Union. The 1974-1977 collective bargaining contract between the Union and Company simply acknowleges that the Pension Plan is in effect, but except for determining the duration of the Plan for bargaining unit employees, sets forth none of its terms or conditions, and specifically states that the Plan "is set forth in a printed booklet entitled Pension Plan for Employees of Consumers Power Company, as Amended to and Including Amendment of July 1, 1971 [and] is subject to the terms and conditions set forth therein."[3]

Consistent with the Company's then-continuous insistence that the Plan's terms and conditions were "not made a part of the collective bargaining agreement," the worker's compensation offset was never a subject of negotiations between the Company and Union, nor ever specifically raised or discussed, during the five bargaining rounds from 1966 to the present. Until 1977, the Company-administered Plan, if discussed at all, was simply presented to the Union as a package plan to be renewed.

Following the enactment of ERISA on September 2, 1974, the Company otherwise modified the Plan to comply with ERISA. Contrary to the Petitioners' assertion (Petition p. 4), the Union objected to the offset at a meeting with the Company on April 29, 1976, and specifically asserted that the offset provision violated the vesting and nonforfeitability requirements of ERISA.

Ignoring these objections, the Company then submitted its amended Plan to the Internal Revenue Service for tax qualifica-

[3]Even were the Plan collectively bargained, as asserted by Petitioners, the parties specifically agreed in collective bargaining that any unlawful contract provisions would be unenforceable and severed from the remainder of the contract.

tion. The Union made similar written objection to the offset provision to IRS, which (by its Detroit office) ultimately responded on April 5, 1977, that the offset did not render the Plan "discriminatory" (which the Union had not alleged), but IRS made no determination regarding the alleged violations of the vesting and forfeiture provisions of ERISA. Contrary to the implications of the Petition (p. 4), no hearing was ever held by IRS.

The Union, seeking not to disqualify the Plan, but to enforce the ERISA rights of its members, instituted this action in the Eastern District of Michigan on July 15, 1977. The District Court held, on June 13, 1978, that the Plan offset provision violates ERISA Section 203(a), 29 USC 1053(a).

The Sixth Circuit Court of Appeals affirmed that holding on January 6, 1981.

REASONS FOR DENYING THE WRIT

1.

Petitioners urge that *certiorari* be granted because of the importance of the issue presented. Respondents agree that the issue presented by this case is of paramount importance. While the existence of worker's compensation offsets means little financially to the relatively few pension plans containing them — indeed, the offset is incontrovertably "actuarially insignificant" in the instant case — the injury such offsets inflict upon affected workers is staggering and irreparable, as exemplified by the circumstances of the individual plaintiffs.[4] The only known study of the impact of such offsets, prepared for the Department of Labor, concluded that while the elimination of such offsets would increase annual pension plan contributions only 0.22 to 0.24 *percent* of current pension costs, it would prevent the forfeiture of $225 to $340 monthly retirement benefits by affected participants (estimated at only 2,000 per year nation-

[4]See note 2, *supra*.

wide). Hays Associates, Analysis of Pension Plans/Worker's Compensation Offsets: Final Report, April 13, 1979, Contract No. J-9-P-7-0065, p. iii. The result urged by Petitioners would exacerbate the hardships of workers who have already suffered disabling on-the-job injuries, and who would now forfeit the normal service pensions which they had earned during their working careers and which they were slated to receive as deferred compensation.

This result would violate ERISA. In enacting ERISA §203(a) Congress unambiguously outlawed — with certain irrelevant exceptions specified in §203(a)(3) and elsewhere in ERISA — *all* private pension plan provisions which operate to reduce a portion or all of a participant's retirement benefit after the participant had put in the years of service required for his pension to "vest" and become "nonforfeitable." Congress, further, intended that the "accrued benefit" which would be required to become vested and nonforfeitable would not be meaningless, and provided a statutory definition of the "accrued benefit," ERISA §3(23), as well as certain minimum benefit accrual standards, ERISA §204. And, as the Sixth Circuit noted below, ERISA §3(19) requires that the participant's nonforfeitable claim attach to "that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.*" 637 F.2d at 1091. Thus, the language, broad purposes and legislative history of ERISA plainly bar the worker's compensation offsets.

While Petitioners seek comfort in the separate anti-discrimination requirements of the tax code — which themselves authorize (for anti-discrimination purposes alone) "integration" of pension benefits with public *retirement* benefits only, IRC §401(a)(5) — Congress clearly intended that the new vesting and anti-forfeiture requirements of ERISA be independent standards which pension plans would thereafter be required separately to meet.

2.

While every outstanding District or Circuit Court opinion on this issue in three different Circuits (the Sixth, Seventh, and Ninth) has invalidated pension plan worker's compensation offsets, Respondents acknowledge that the one contrary outstanding decision, that of the Third Circuit in *Buczynski* v *General Motors Corp*, 616 F.2d 1238 (CA 3,1980), has created a conflict among the Courts of Appeals. Moreover, it is anticipated that this Court will decide *Buczynski* and the companion case, *Alessi* v *Raybestos-Manhattan, Inc*, Docket Nos. 80-193 and 79-1943, respectively, before the end of the current term of the Court. That decision may dispose of the issue in this case.

Accordingly, Respondents suggest that this Court hold the Petition in abeyance until the Court issues its decision in *Buczynski* and *Alessi*. This might obviate the need to process the instant case before the Court — with accompanying expenditure of time, effort and resources — should that decision be dispositive of the present case.

CONCLUSION

For the foregoing reasons, Respondents request the Court to hold Petitioners' Petition for Writ of Certiorari in abeyance pending issuance of the Court's decision in *Buczynski* and *Alessi*.

Respectfully submitted,

THEODORE SACHS
I. MARK STECKLOFF
Attorneys for Plaintiffs-Respondents
1000 Farmer
Detroit, MI 48226
(313) 965-3464

DATED: April 30, 1981

Office-Supreme Court, U.S.
MAY 18
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1674

Consumers Power Company, and the
Pension Plan for Employees of Consumers
Power Company,

Petitioners

vs.

Utility Workers Union of America
AFL-CIO, and its Michigan State Utility
Workers Council, Lewis J. Tinklepaugh,
Clarence J. Segorski, Leo Lingram, Burnell Clough,
Robert Yon, Ray Rogers and Paul de Hate,

Respondents

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM O. ALLEN
ARUNAS T. UDRYS
DONOVAN E. CHENEY AND
WILLIAM M. ABBOTT
Attorneys for Petitioners
145 South Jackson Street
Jackson, Michigan 49201
(517) 787-4100

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1674

Consumers Power Company, and the
Pension Plan for Employees of Consumers
Power Company,

Petitioners

vs.

Utility Workers Union of America
AFL-CIO, and its Michigan State Utility
Workers Council, Lewis J. Tinklepaugh,
Clarence J. Segorski, Leo Lingram, Burnell Clough
Robert Yon, Ray Rogers and Paul de Hate,

Respondents

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Respondents' counter-statement of the case is inaccurate and incomplete, and the Court is respectfully referred for a complete and accurate statement of the case to pages 3-6 of Petitioners' Petition for Writ of Certiorari.

In particular, Respondents have inserted into their Brief facts which have no evidentiary support in the record, purportedly pertaining to the injuries received and worker's disability benefits to which the various respondents have been entitled.

Nowhere in the record of this case is there any testimony or other evidence supporting these alleged facts, and it is submitted that Respondents have gratuitously inserted them in their Brief in an attempt to create prejudice.

Further, while purporting to be in opposition to the Petition, Respondents' Brief is totally devoid of any support for their position. Rather, on page 6 of Respondents' Brief, Respondents agree with Petitioners that "the issue presented by this case is of paramount importance."

DISPOSITION OF THE CASE

Petitioners concur in Respondents' suggestion that this Court hold the Petition in abeyance until the Court issues its decision in Buczynski v General Motors Corp., Docket No. 80-193 and Alessi v Raybestos-Manhattan, Inc., Docket No. 79-1943, as it appears that this

Court's decision in Buczynski and Alessi might be dispositive of the issue in the present case.

Respectfully submitted,

William O. Allen
Arunas T. Udrys
Donovan E. Cheney
William M. Abbott
Attorneys for
Petitioners
145 S. Jackson Street
Jackson, Michigan 49201
(517) 787-4100